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JUL 22 2003
CLERK'S OFFICE
U.S. DISTRICT COURT
EASTERN MICHIGAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY WILLIAMS-EL,

Plaintiff,

v.

WILLIAM OVERTON, GEORGE PRAMSTALLER, DAVE JAMROG, PAUL KLEE, CHAD MARKWELL, MARY JO PASS and BONNIE PETERSON,

Defendants.

CIVIL ACTION NO. 02 CV 75133 DT

DISTRICT JUDGE DENISE PAGE HOOD

MAGISTRATE VIRGINIA M. MORGAN

REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION FOR DISMISSAL OR SUMMARY JUDGMENT

Introduction

This is a *pro se* action based on 42 U.S.C. § 1983. Timothy Williams-El is an inmate in the custody of the Michigan Department of Corrections ("MDOC"). The parties named as defendants in the complaint are William Overton, MDOC Director; David Jamrog, Warden of MDOC's Adrian Correctional Facility; Mary Jo Pass and Paul Klee, MDOC Assistant Deputy Wardens; Chad Markwell, MDOC Resident Unit Officer; George Pramstaller, D.O., Chief Medical Officer of MDOC's Bureau of Health Care Services; and Bonnie Peterson, formerly an MDOC Health Unit Manager.

The complaint contains two claims. Plaintiff alleges that he was improperly denied a surgical procedure and related post-operative therapy to correct a medical problem with his right arm. He also asserts that he was wrongfully denied a single-occupancy cell to accommodate his impairment. (These claims will hereafter be referred to as, respectively, the "Medical Claim" and the "Accommodation Claim.") He seeks declaratory, injunctive, and monetary relief.

Process has been served on all parties except Dr. Pramstaller. The Michigan Attorney General has entered an appearance on behalf of the parties served with process, who will hereafter be collectively referred to as "Defendants."

The complaint was filed on January 7, 2003. In lieu of an answer, Defendants filed a motion on April 15, 2003, seeking dismissal or summary judgment under F.R.Civ.P. 12 and 56, respectively. The Court recommends that the motion be granted.

Discussion

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

"To assert a § 1983 claim, a plaintiff must prove that he was deprived of a right secured by the Constitution or the laws of the United States and that the deprivation was caused by a person who was acting under color of state law." Mays v. City of Dayton, 134 F.3d 809, 813 (6th

Cir. 1998). The sources of the federal right which Plaintiff invokes are Eighth and Fourteenth Amendments to the Constitution, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).

I. Medical Claim

As explained in a report dictated by Raymond Noellert, M.D., and dated March 5, 2002, Plaintiff "has apparently had noninvoluting cavernous hemangiomas in the right upper extremity since birth." Exhibit G of Complaint (the "Noellert Report"). A "hemangioma" is a "congenital anomaly, in which proliferation of blood vessels leads to a mass that resembles a neoplasm." Stedman's Medical Dictionary (26th ed. 1995). Dr. Noellert observed that Plaintiff held his right arm "with the wrist in a tremendously contracted position of nearly 90 degrees, from which it cannot be passively extended." Noellert Report. Plaintiff related to Dr. Noellert that he is "bothered by . . . pain, swelling of the hemangiomas, and . . . tremendous inconvenience from the markedly fixed posture of the hand, and inability to use the hand in any way." Id. Dr. Noellert's "impression" after examining Plaintiff was "multiple noninvoluting cavernous hemangiomas right upper extremity, with secondary wrist joint and musculotendinous digital contracture."[1]

A year prior to Dr. Noellert's examination, in March of 2001, surgery was performed to remove a hemangioma from Plaintiff's right hand. Exhibit B of Complaint. Plaintiff indicated that pain relief was the primary objective of this procedure. See Noellert Report ("He recently

[1]Plaintiff explained to Dr. Noellert that "he has a condition called Kasabach-Merritt syndrome." Noellert Report. Dr. Noellert does not explicitly accept or reject that diagnosis.

had an hemangioma . . . removed . . . for an indication of pain.") Plaintiff apparently had similar procedures performed "from birth to age 10." Id.

In January of 2002, Plaintiff was evaluated by K. Nimr Ikram, D.O. Dr. Ikram's assessments were "hemangioma of the right hand and forearm," and "flexion contracture of the right wrist." Exhibit E of Complaint. The doctor's "Plan" reads as follows:

> The clinical findings and examination were discussed with the patient. He was asked exactly what he wants with the right arm and he states that he wants the wrist to be straightened and wants the hemangiomas removed. He was told that this would be a large complicated surgical procedure and he may not ever get the function of his fingers back. He states that he wants whatever done to get wrist strengthening and to remove the hemangiomas. The patient was told at this time that considering he wants this last surgery to straighten out his wrist and get function back in his finger, we would recommend that he go to St. Joseph hand surgeons, who deal with this on a daily basis. The patient agrees and will go to . . . St. Josephs.

Id.

It was with Dr. Ikram's referral that Plaintiff was seen by Dr. Noellert in March of 2002. The report from Dr. Noellert concludes:

> Any type of surgical correction would be a fairly extensive undertaking. It may not be possible to correct his wrist contracture without considering fusion, with proximal row carpectomy. Digital lengthening would likely require something like a superficialis to profundus transfer with step cut lengthening of his wrist flexors. This could be done in association with removal of his hemangiomas. Obviously this is a lot of surgery, with significant potential for infection, skin slough, and nerve or vascular injury. It is even possible that he could lose his hand as a result of attempted treatment. Either [*sic*– even if?] everything goes well, with the posture of the hand being improved, I would

> not expect much in the way of purposeful digital flexion over strength, with the hand largely functioning as a passive assist.
>
> This was explained at length in detail to the patient today. He is adamant that he understands this and would like to proceed as he simply cannot stand the hand the way it is. On that basis he will receive authorization for treatment.

Noellert Report.

Following Dr. Noellert's examination, the "Medical Service Provider" ("MSP"), J. Hoffman, D.O., reported on March 23, 2002, his conclusion that Plaintiff was "a candidate for contracture release," and indicated that he would "call for authorization." Exhibit F of Complaint. However, Correctional Medical Services ("CMS") denied permission to proceed with surgical intervention. Exhibit H of Complaint. The explanation for denial was, "functional return of hand is not a known result. Surgery would be cosmetic and dangerous." Id. On March 26, 2002, Dr. Hoffman appealed the denial on grounds that "the request is for pain relief, not to regain function." Id.

This appeal was rejected with the following notation:

> The patient had hand surgery eval on 3/5/02. The dictated note indicates the hazards of this and the probable futility of it. Literature about this disease was given to the MSP. Hand surgery re-eval will accomplish nothing. If there is some other avenue the MSP wishes to pursue, please submit with supporting documents the rationale of the request.

Id.

On April 8, 2002, Dr. Hoffman again appealed, stressing that "the request is to have surgery to relieve pain, not correction of the hand." Id. The CMS indicated in response to this second appeal that the "case will be presented at MDOC MAC meeting." Id.

In a memo dated August 30, 2002, Dr. Pramstaller reported that Plaintiff's "request for Hand Surgery . . . was reviewed by the Medical Services Advisory Committee at its August 28, 2002 meeting." Exhibit 7 of Plaintiff's Brief. Based on this review, the memo continues, "the request was . . . pended for more information." Id. Dr. Pramstaller directed the memo's addressees – a Dr. Urban and Karen Peters, R.N. – to "call Hand Surgeon and see if he agrees with position that pain is caused by contracture and the best way to control it is by tendon lysis." Id.

Dr. Noellert was contacted on October 2, 2002, and his comments were summarized in progress notes as follows: "Staged approach may be tried to relieve pain. First excision hemangiomas, then lysis adhesion if needed." Exhibit 8 of Plaintiff's Brief.

Exhaustion

"No action shall be brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Prisoners must therefore "exhaust the prison's grievance procedures before filing suit in federal court." Wyatt v. Leonard, 193 F.3d 876, 878 (6th Cir. 1999). This means that the prisoner must pursue all levels of appeal provided in the grievance process. See Hartsfield v. Vidor, 199 F.3d 305, 309 (6th Cir. 1999); White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (*per curiam*); see generally MDOC Policy Directive 03.02.130

(allowing for an initial grievance (step one) and two levels of appeal (steps two and three) if the prisoner is not satisfied with the response received). Contrary to what Plaintiff asserts, see Plaintiff's Brief at 5, 10, the exhaustion requirement applies not only to § 1983 claims, but also to claims based on the ADA or the Rehabilitation Act. See Lavista v. Beeler, 195 F.3d 254, 258 (6th Cir. 1999).

Defendants maintain that Plaintiff never filed a grievance against them with respect to the medical claim. See Defendants' Brief at 4. Plaintiff disputes this contention. See Plaintiff's Brief at 5.

The burden is on Plaintiff to demonstrate that he has satisfied the exhaustion requirement. See Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000) ("... a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome."). The documentation which he attaches to the complaint does in fact indicate that Plaintiff fully prosecuted a grievance relating to the quality of medical care received for his condition and expressing concern as to when surgical intervention would be authorized. See Exhibit A of Complaint.

Defendants do not argue that the foregoing grievance goes to an issue different from the issue Plaintiff is now asserting by way of the medical claim.[2] But they point out that they are not personally identified in the grievance and, citing Curry v. Scott, 249 F.3d 493 (6th Cir. 2001), assert that Plaintiff is therefore "precluded from maintaining an action against them." Defendants' Brief at 5.

The plaintiffs in Curry alleged that they had been assaulted by a corrections officer, David Scott, at the Southern Ohio Correctional Facility ("SOCF"). Curry, 249 F.3d at 497. Among the defendants named in addition to Scott was Darren Howard, another corrections officer, id., whom the plaintiffs claimed "stood by and did nothing while Scott committed these assaults." Id. at

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[2]The grievance states:

> I have requested medical follow-up care, and have not been seen by the doctor, nor have I been treated. I am experiencing a lot of pain from the tumors in my fingers, hand, and arm. My conditions have gotten worst. For example, I am experiencing more pain then ever. I can not open my hand, and the tumors in my fingers, hand, and arm has gotten bigger. I am experiencing nerve pain in my right bicep up my shoulder, and behind my ear and head.

Exhibit A of Complaint.

Plaintiff also refers to an attached "health care kite." Id. This is correspondence dated February 6, 2002, and addressed to the "Health Care Director" at the Standish Correctional Facility, where Plaintiff was then incarcerated. Id. It states:

> On 10-23-01 an evaluation was done . . . concerning my Rehabilitation needs . . . . My "immediate concern" now is has my surgery been approved. I know you cannot tell what date it will take place; however it will allow Dr. Hoffman to upgrade my needs.
>
> Also since my most recent evaluation, changes have occurred, such as painful episodes at times of sleep, and feel now while I can tell and describe my symptoms something can be done while waiting.

Id.

498. The district court dismissed the action against Howard for failure to exhaust, as "none of the prisoners complained about Howard's behavior, nor even mentioned Howard in their prison grievances." Id. at 504.

The plaintiffs appealed this dismissal, arguing "that requiring prisoners to put forth all legal theories in their grievances imposes an unduly heightened pleading standard on § 1983 plaintiffs." Id. They reasoned that "an investigation into Howard's role in the incident would have flowed naturally from, or been encompassed within, even the most general grievance and, accordingly, nothing beyond the grievances they filed was required to institute administrative proceedings against Howard." Id. at 505.

The Sixth Circuit rejected this argument. "The claim against Howard," the court observed, "is a separate claim, against a separate individual, premised on a separate and independent legal theory." Id. The purpose underlying the grievance process is "to alert prison officials to problems." Id. (citation omitted). "The plaintiffs' grievances may have alerted SOCF to problems with Scott, but they did not reasonably alert SOCF to problems with Howard." Id.

Consistent with Curry, Plaintiff must satisfy the Court that his grievance clearly and directly implicated each Defendant, even though none of them was mentioned in the grievance. Plaintiff, however, offers no theory as to why prison officials can fairly be said to have been put on notice by his grievance that it was specifically directed at a Defendant.

Nor is it readily apparent that such a connection should have been made by those charged with resolving the grievance. Dr. Hoffman's request for authorization of surgery was not denied by any Defendant. See Exhibit H of Complaint. Rather, the request was rejected initially and on

appeal by a "R. DeMasi, M.D." Id. After a second appeal, it was Dr. Pramstaller who determined that surgery should not be permitted unless and until other measures proved ineffective in relieving Plaintiff's pain. See supra p. 6.

In short, there is no sound basis for concluding that the grievance filed by Plaintiff put prison officials on notice that he was faulting any Defendant in connection with the denial of Dr. Hoffman's request. Since the medical claim is predicated on that denial, the Court concludes that Plaintiff has failed to exhaust his administrative remedies insofar as the medical claim is directed at any Defendants. See generally Burton v. Jones, 321 F.3d 569, 574 (6th Cir. 2003) ("... a prisoner must administratively exhaust his or her claim *as to each defendant associated with the claim* ...." (emphasis added)).[3] That claim should therefore be dismissed without prejudice. See generally, e.g., Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (*per curiam*) (Dismissal based on failure to exhaust is "without prejudice.").

Lack of Evidence

Defendants assert that they "are entitled to dismissal" of the medical claim "based on Plaintiff's failure to state a claim." Defendants' Brief at 7. Thus they implicitly invoke Rule 12(b)(6), which calls for dismissal in the event of "failure to state a claim upon which relief can be granted." F.R.Civ.P. 12(b)(6). In responding to Defendants' motion, however, Plaintiff attached various exhibits in support of his position. The Court will therefore assess this

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[3]Plaintiff notes that Dr. Pramstaller "was identified in the Step III part of the grievance" that he filed. Plaintiff's Brief at 6. See Plaintiff's Step III Appeal (unmarked exhibit of Complaint). However, the medical claim is not directed solely at Dr. Pramstaller. See Complaint at 21-22 & ¶¶ 4-9 & 39.

argument in accordance with Rule 56. See F.R.Civ.P. 12(b) (A Rule 12(b)(6) motion "shall be treated as one for summary judgment" if "matters outside the pleadings are presented.").[4]

Dismissal of the medical claim is warranted, Defendants assert, because the "Complaint contains no allegations that . . . Pass, Markwell, Klee or Peterson had any involvement with" the refusal to authorize surgical intervention. Defendants' Brief at 6. With respect to Overton and Jamrog, Defendants assert that there has been "no showing of facts supporting a theory of supervisory liability." Id. at 7.

In response to these assertions, it was incumbent upon Plaintiff to identify or submit evidence which could plausibly support a finding of liability. See generally, e.g., Cardamone v. Cohen, 241 F.3d 520, 524 (6th Cir. 2001) ("Summary judgment is appropriate after sufficient time for discovery if a party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case."); Employers Ins. of Wausau v. Petroleum Specialties, Inc., 69 F.3d 98, 102 (6th Cir. 1995) (The party moving for summary judgment "need not support its motion with evidence disproving the nonmoving party's claim, but need only show . . . that there is an absence of evidence to support the nonmoving party's case. . . . The pivotal question is whether the party bearing the burden of proof has presented . . . evidence on which the jury could reasonably find for" that party. (citations & quotation marks omitted)); Cox v. Kentucky Dep't of Transp., 53 F.3d 146, 149 (6th Cir. 1995) ("Essentially, a motion for summary judgment is a means by which to challenge the

[4]Although Defendants' motion is supported by affidavits and documents related thereto, this evidence pertains solely to the accommodation claim.

opposing party to put up or shut up on a critical issue." (citation & quotation marks omitted)). He has not met this burden, as none of Plaintiff's exhibits indicates that any Defendant was personally involved with the decision to deny the surgery request.

Even if not directly and personally involved in the decision to withhold authorization for surgery, a "supervisory official" could still be liable if he or she "at least implicitly authorized, approved, or knowingly acquiesced in" that decision. Combs v. Wilkinson, 315 F.3d 548, 558 (6th Cir. 2002). As with the issue of personal involvement, however, there is no evidence to support Plaintiff's position on this point. Defendants are therefore entitled to summary judgment.

A grant of summary judgment on grounds of insufficient evidence generally presupposes that there has been "adequate time for discovery." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). See also, e.g., Plott v. General Motors Corp., 71 F.3d 1190, 1195 (6th Cir. 1995) ("Before ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case."). Plaintiff complains that he has not yet been provided with this opportunity. See Plaintiff's Brief at 3.

If the party opposing summary judgment shows by affidavit that "for reasons stated" he is unable to "present . . . facts essential to justify the . . . opposition," the court "may order a continuance to permit . . . discovery to be had." F.R.Civ.P. 56(f). It "is up to the" non-movant "to state why more discovery is needed." Wallin v. Norman, 317 F.3d 558, 564 (6th Cir. 2003). Absent a Rule 56(f) affidavit from the non-movant, "there is no justification for the district court's blanket statement that a motion for summary judgment will be premature until the close

of discovery." Id. Thus Plaintiff must satisfy the Court that his inability to conduct discovery would be prejudicial.

Plaintiff does not make a persuasive case for delaying a decision on Defendants' motion. A party is required by Rule 56(f) to demonstrate "how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact." Emmons v. McLaughlin, 874 F.2d 351, 356 (6th Cir. 1989) (citation omitted). This of course means that the party must identify "what material facts" it expects to "uncover" through discovery. Cacevic v. City of Hazel Park, 226 F.3d 483, 489 (6th Cir. 2000) (citation & quotation marks omitted). Moreover, the factual basis for this expectation must be articulated and reasonably compelling. Cf. Emmons, 874 F.2d at 357-58 (In this case, the court faulted the Rule 56(f) affidavit for failing to state "facts that, if they existed, should have been within Appellant's personal knowledge." The court further observed that "mere speculation as to the usefulness" of an "informant's testimony" was "insufficient to justify disclosure of his identity."); see also, e.g., Duffy v. Wolle, 123 F.3d 1026, 1041 (8th Cir. 1997) (" . . . Rule 56(f) does not condone a fishing expedition where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation." (citation & quotation marks omitted)).

Plaintiff simply expresses a general need for discovery: He does not specify what facts he believes discovery would reveal, why he harbors that belief, and how the facts would warrant denial of Defendant's motion. Plaintiff's professed need to engage in discovery therefore amounts to the kind of "blanket statement" which Wallin disapproved. See also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 28 F.3d 1388, 1395 (5th Cir. 1994)

("The nonmoving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." (citation & quotation marks omitted)).

For these reasons, summary judgment should enter in favor of Defendants notwithstanding the lack of discovery.

Qualified Immunity

"In civil suits pursuant to 42 U.S.C. § 1983 for money damages, qualified immunity protects a public official from being sued as long as the official does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Crockett v. Cumberland College, 316 F.3d 571, 579 (6th Cir. 2003) (citation and quotation marks omitted). Defendants argues that they enjoy such protection vis-à-vis Plaintiff's Medical Claim. Defendants' Brief at 7-8.

Prior to "addressing the substance of a claim of qualified immunity, the court must first determine whether the plaintiff has stated a claim of a constitutional violation at all." Skousen v. Brighton High School, 305 F.3d 520, 527 (6th Cir. 2002). See also Crockett, 316 F.3d at 579 (An inquiry into whether a constitutional "right was clearly established" is necessary only if it is demonstrated that the right was in fact violated.). Thus before dealing specifically with the matter of qualified immunity, the Court will consider the merit of Plaintiff's assertion that Defendants' conduct was in violation of the Eighth or Fourteenth Amendment.

The Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII. It "requires the State to provide adequate medical care to incarcerated prisoners." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 198 (1989). "In order to state a

cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). "Deliberate indifference" requires a showing that "the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Farmer v. Brennan, 511 U.S. 825, 842 (1994).

There is no sound medical evidence that Plaintiff was subjected to a significant risk of serious harm by the withholding of authorization for surgery. Indeed, the evidence points to the opposite conclusion. While Dr. Hoffman was emphatic on the point that the surgery was for pain relief, see Exhibit H of Complaint, Dr. Noellert – the specialist whose recommendation Dr. Hoffman was acting upon – is much more equivocal on the point. Dr. Noellert's report reflects substantial doubt on his part as to whether surgery was advisable, and he indicates that the primary objective would be to improve appearance. See supra p. 4. Most important of all, the evidence clearly indicates that Dr. Noellert and prison medical authorities were in agreement that, apart from the potential cosmetic benefits, the need for the requested surgery could be obviated through less drastic measures designed to alleviate Plaintiff's pain. See supra p. 6; see also Specialty Consult Report (unmarked exhibit of Plaintiff's Brief) (wherein Dr. Hoffman indicates that the surgery is not "urgent"). The record therefore does not reasonably support the inference that prison officials acted with deliberate indifference.

Plaintiff fares no better under the Fourteenth Amendment, which requires "equal protection of the laws." U.S. Const. Amend. XIV, § 1. There is no violation of the Equal Protection Clause absent a showing that prison officials discriminated against Plaintiff on the basis of his disability. See Copeland v. Machulis, 57 F.3d 476, 480 (6th Cir. 1995) (*per curiam*)

("In order to establish a violation of the Equal Protection Clause, an inmate must prove that a racially discriminatory intent or purpose was a factor in the decision of the prison officials."); cf. Hansen v. Rimel, 104 F.3d 189, 190 (8th Cir. 1997) (stating that the warden/defendant "could only have violated" a hearing-impaired inmate's "right to equal protection if he treated" the inmate "dissimilarly than similarly situated inmates"). Plaintiff submitted no evidence which suggests that the refusal to authorize surgery was discriminatory.

The Court therefore concludes that the denial of authorization for surgery violated neither the Eighth nor Fourteenth Amendment. A necessary corollary of this conclusion, of course, is that the denial violated no right which was "clearly established." See generally Crockett, 316 F.3d at 579 (The right in question must be "so clearly established that a reasonable official would understand that the particular conduct at issue violated that right.").

"The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity." Rich v. City of Mayfield Heights, 955 F.2d 1092, 1095 (6th Cir. 1992). Plaintiff cited no judicial decision which supports his contention that the refusal to authorize surgery violated his constitutional rights – let alone a binding decision predating the alleged violation. See generally Sheets v. Moore, 97 F.3d 164, 166 (6th Cir. 1996) ("In determining whether a constitutional right is clearly established, a district court must find binding precedent by the Supreme Court, its court of appeals, or itself." The "unlawfulness must be apparent" under "pre-existing law." (citation and quotation marks omitted)). Thus even if this refusal were unconstitutional, Plaintiff is barred from obtaining monetary relief pursuant to the doctrine of qualified immunity.

II. Accommodation Claim

"Whenever a prisoner is identified as having a medical condition which restricts his . . . ability to function adequately in the institutional environment, a qualified health professional shall identify reasonable options available . . . which will meet the prisoner's special medical need." Policy Directive 04.06.160. Plaintiff alleges that in keeping with this policy, he was moved into a "handicap (single) cell." Complaint at ¶ 43. This accommodation, according to Plaintiff, was authorized by an Assistant Resident Unit Supervisor identified as "M. Risley." Id. Plaintiff was not permitted to remain in a single cell, however, and prison officials have denied his request for single-cell accommodation. See id. at ¶¶ 40-45, 49; Affidavit of Paul Klee at ¶ 3.

Total Exhaustion

Defendants ask the Court to invoke the "'total exhaustion' rule," Defendants' Brief at 5, which holds that "a prisoner civil rights action" having "both exhausted and unexhausted claims" must "be dismissed in its entirety . . . , rather than simply dismissing . . . the unexhausted claims." Jenkins v. Toombs, 32 F.Supp.2d 955, 957 (W.D. Mich. 1999). According to Defendants, "the majority of courts that have addressed the issue have applied" this rule. Defendants' Brief at 5.

As Defendants suggests, there is a split in authority on the question of whether § 1997e(a) mandates dismissal of all claims if at least one has not been exhausted. See Rivera v. Whitman, 161 F.Supp.2d 337, 339-40 (D. N.J. 2001), overruled on other grounds by Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002) (collecting cases). On two occasions, the Sixth Circuit has acknowledged the issue, without deciding it. See Burton, 321 F.3d at 577 ("Because we have

concluded that [the] district court erred when it determined that Burton had not administratively exhausted his First Amendment retaliation claim against the defendants, we do not need to reach the question of whether the district court erred when it dismissed Burton's entire lawsuit because Burton failed to exhaust the available administrative remedies with respect to one of his claims.")[5]; Knuckles El, 215 F.3d at 642 ("We reserve to another day the question of whether exhausted claims in a 'mixed' complaint should be addressed . . . or whether such a complaint should be dismissed in its entirety.").

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[5]Although Burton explicitly declined to decide the issue, the court all but rejected the total-exhaustion rule in *dictum*. See Burton, 321 F.3d at 575 n.2 (The "holding" in Hartsfield v. Vidor, 199 F.3d 305 (6th Cir. 1999), "illustrates that a prisoner's lawsuit, which alleges multiple claims against multiple defendants, is not vulnerable to dismissal under § 1997e(a) simply because the prisoner has failed to exhaust a particular claim as to a specific defendant."). See also Riley v. Richards, No. 99-1327, 2000 WL 332013, at *2 (6th Cir. Mar. 23, 2000) (*per curiam*) (likewise citing Hartsfield in declaring that "the district court may address the merits of the exhausted claims and dismiss only those that are unexhausted").

Hartsfield affirmed the district court's rejection on the merits of some of the prisoner/plaintiff's claims, and remanded for dismissal of other claims for failure to exhaust. See Hartsfield, 199 F.3d at 309-10. But the court did not explicitly address the question of whether exhausted claims must be dismissed along with those that are unexhausted. Burton and Riley therefore attach undue significance to the case. See Rose v. Lundy, 455 U.S. 509, 514 n.5 (1982) ("In *Gooding v. Wilson*, 405 U.S. 518 (1972), this Court reviewed the merits of an exhausted claim after expressly acknowledging that the prisoner had not exhausted his state remedies for all of the claims presented in his habeas petition. *Gooding* does not control the present case, however, since the question of total exhaustion was not before the Court."); Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000) (a post-Hartsfield case in which the Sixth Circuit implicitly assumed that it has not yet decided whether all claims must be exhausted to avoid dismissal pursuant to § 1997e(a)); Smeltzer v. Hook, 235 F.Supp.2d 736, 742 (W.D. Mich. 2002) (The "issue of total exhaustion was not before the Court" in Hartsfield.); Rivera v. Whitman, 161 F.Supp.2d 337, 340 n.1 (D. N.J. 2001) (observing that in Hartsfield, "the 'total exhaustion' issue . . . was not squarely presented nor considered by the court," and that the "issue was not among those on appeal").

The starting point for resolving this issue is of course § 1997e(a) itself. As noted earlier, that statute prohibits the commencement of an "*action* . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The highlighted term indicates that a court may dismiss *all* claims if at least one has not been exhausted. See Black's Law Dictionary (7th ed. 1999) (defining an "action" as a "civil or criminal judicial proceeding"); F.R.Civ.P. 3 ("A civil action is commenced by filing a complaint with the court."); Hudson v. Reno, 130 F.3d 1193, 1199-1200 (6th Cir. 1997), overruled on other grounds by Pollard v. E. I. du Pont de Nemours & Co., 532 U.S. 843 (2001) (finding that the "plain" meaning of the term "action," used in 42 U.S.C. § 1981a, is a lawsuit, as distinguished from particular "claims" asserted in a lawsuit); Rivera, 161 F. Supp.2d at 341 ("The plain meaning of 'action'" is "patently distinct from 'claim.'").

This inference is reinforced by another provision in the same statute. Section 1997e(c)(2) authorizes dismissal of a frivolous "*claim* without first requiring the exhaustion of administrative remedies." 42 U.S.C. § 1997e(c)(2) (emphasis added). The choice of the word "claim" in this provision logically suggests that "action," as used in sub-paragraph (a) of § 1997e, refers to the entire lawsuit. See Rivera, 161 F. Supp.2d at 341 ("Congress's use of the different terms indicates that it intended different meanings.").

Also noteworthy is the fact that the phrase "civil action with regard to prison conditions," which is nearly identical to the formulation in § 1997e(a), is defined as "any *civil proceeding* . . . with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2) (emphasis added). This

definition implicitly equates a "civil proceeding" with an "action," and thus counsels against a narrow construction of the latter term. See Rivera, 161 F. Supp.2d at 340-41.

But while it is fairly clear that §1997e(a) *authorizes* total dismissal, it does not necessarily follow that the statute *requires* it. As noted by Judge Enslen, "a court can prevent a plaintiff from bringing an action before his administrative remedies are exhausted in two ways: by dismissing the complaint altogether or by limiting the complaint to exhausted claims." Jenkins, 32 F.Supp.2d at 957. Thus even a partial dismissal is compatible with the language of § 1997e(a). Cf. Rose v. Lundy, 455 U.S. 509, 516-518 (1982) (determining that 28 U.S.C. § 2254 is inconclusive on the question of whether a court could review a "mixed" habeas petition – *i.e.* a petition raising exhausted and unexhausted claims).[6] But see, e.g., Rivera, 161 F.Supp.2d at 341 (The statute's "plain language compels a 'total exhaustion' rule.").

Although conceding that the relevant statutory language did not compel its conclusion, Rose held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Id. at 522 (footnote omitted). Rose justified its holding on the ground that

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[6]The statute at issue in Rose provided that an "application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (quoted in Rose, 455 U.S. at 516 n.9). Thus it is roughly analogous to 42 U.S.C. § 1997e(a). See Jenkins, 32 F.Supp.2d at 957 (noting that the Court in Rose "found that . . . language" which was "similar" to § 1997e(a) "did not, in and of itself, impose a total exhaustion requirement").

the total-exhaustion rule would promote comity between federal and state courts. See id. at 515-19.[7]

Section 1997e(a), calls for deference to prison grievance procedures, rather than to state judicial proceedings as in the habeas statute. However, both § 1997e(a)'s exhaustion requirement and that of the habeas statute are designed to ensure that the prisoner pursue other available avenues before seeking relief from the federal courts. Compare Rose, 455 U.S. at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. . . . Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.") with Wyatt, 193 F.3d at 878-79 (Section 1997e(a) "insure[s] that prisons . . . are given the opportunity to respond to prisoner complaints . . . , so that . . . injuries are prevented in the future. . . . Courts will conserve time and effort as a result of any factfinding during the

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[7]Subsequent to Rose, the habeas statute was amended to provide that an "application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). This amendment, however, does not authorize courts to reject specific claims upon which a habeas petition is based. See Rockwell v. Yukins, 217 F.3d 421, 424 (6th Cir. 2000) (Section 2254(b) makes "clear that the only circumstance under which mixed petitions may be considered by a district court is where the court determines that the petition must be denied in its entirety."); see also Martin v. Jones, 969 F.Supp. 1058, 1063 (M.D. Tenn. 1997) ("The language of § 2254(b)(2) . . . suggests that the courts only have discretion to deny an entire 'mixed' application on the merits, but cannot deny a particular claim."). Thus Rose's total-exhaustion rule was "altered" only "slightly" by § 2254(b)(2). Rockwell, 217 F.3d at 424. See Martin, 969 F.Supp. at 1063 ("If a court does not elect to deny the whole application, then presumably it must adhere to the total exhaustion rule and dismiss the petition in its entirety.").

administrative process . . . . (citation & quotation marks omitted)). Rose's premise – that this design is better served by adherence to the total-exhaustion rule – therefore applies with equal force to § 1997e(a). See, e.g., Smeltzer v. Hook, 235 F.Supp.2d 736, 745 (W.D. Mich. 2002); Rivera, 161 F.Supp.2d at 342-32. But see, e.g., Jenkins, 32 F.Supp.2d at 959.

In short, there is a basis to apply the reasoning of Rose's habeas exhaustion to prisoner cases brought under § 1983. Cf. Brown, 139 F.3d at 1103 (Section 1997e(a) "recognizes that it is difficult to explain why we require full exhaustion of state remedies in habeas corpus cases involving life and liberty, but allow direct access in prison rights cases under § 1983."). Consistent with that decision, the Court concludes that §1997e(a) requires dismissal of both exhausted and unexhausted claims. See Wyatt, 193 F.3d at 879 (Under § 1997e(a), "it is now incumbent upon the district court to assure that the exhaustion requirement has been substantially met before proceeding to the merits of *any* prisoner claims. If the exhaustion requirement has not been substantially met, the federal *case* should be dismissed . . . ." (emphasis added)); Mack v. Dewitt, 40 Fed.Appx. 36, 38 (6th Cir. 2002) (*per curiam)* ("When a prisoner . . . only partially exhausts administrative remedies, dismissal of the complaint is appropriate.").

An exception to the total-exhaustion rule is recognized in habeas cases presenting "unusual or exceptional circumstances." Rockwell v. Yukins, 217 F.3d 421, 423 (6th Cir. 2000). Compare Wyatt, 193 F.3d at 879 (Section 1997e(a) may be subject to "certain limited exceptions."). But even if this exception extends to § 1983 cases, there is no apparent basis for applying it in this case. Compare Rose, 455 U.S. at 515-16 (observing that the common-law "exhaustion doctrine" made exceptions "only in rare cases where . . . circumstances of peculiar

urgency are shown to exist" (citation, quotation marks & footnote omitted)); Sitto v. Bock, 207 F.Supp.2d 668, 676-77 (E.D. Mich 2002) (The "outright dismissal" of a habeas petition for failure to exhaust is inappropriate if the prisoner would be time-barred from re-filing the petition following exhaustion.); see generally Wyatt, 193 F.3d at 879 (Any "exceptions" to § 1997e(a) which "may arise . . . will be rare."). Nor have Defendants argued for application of a statutory exception to § 1997e(a), which permits courts to disregard the exhaustion requirement in "the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c)(2). The total-exhaustion rule should therefore be invoked, and Plaintiff's accommodation claim should accordingly be dismissed along with the medical claim.[8]

Although this dismissal is without prejudice, the more appropriate source of authority is F.R.Civ.P. 56, rather than F.R.Civ.P. 12. See Hite v. Kimmerly, 22 Fed.Appx. 531, 531-32 (6th Cir. 2001) (affirming the district court's grant of summary judgment based on failure to comply with 42 U.S.C. § 1997e(a)); cf. Ravencraft v. UNUM Life Ins. Co. of America, 212 F.3d 341, 344 (6th Cir. 2000) (affirming the district court's grant of summary judgment in a disability-benefits case based on failure to exhaust administrative remedies, as required by ERISA, but vacating and remanding with instructions to "dismiss the asserted cause of action without prejudice"). But see Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.), petition for cert. filed, 71

[8]Even if the total-exhaustion rule is not applied, the accommodation claim should be dismissed as against Overton. Plaintiff has produced no evidence to rebut Defendants' assertion that he failed to identify Overton in his accommodation-related grievances. See Defendants' Brief at 14.

U.S.L.W. 3668 (U.S. Apr. 1, 2003) (No. 02-1486) ("... the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment."); Mardirossian v. Paul Revere Life Ins. Co., 286 F.3d 733, 735 (4th Cir. 2002) (A ruling that the plaintiff failed to exhaust administrative remedies is not on the merits, and therefore summary judgment is inappropriate. Dismissal should instead be "for lack of subject matter jurisdiction."). In keeping with the logic of the total-exhaustion rule, the dismissal should extend to claims asserted against Dr. Pramstaller, regardless of whether those claims were exhausted. See Burton, 321 F.3d at 574 (quoted supra p. 9).

No Discrimination

To establish that Defendants violated the ADA, the Rehabilitation Act, or the Equal Protection Clause of the Fourteenth Amendment, Plaintiff must demonstrate that the refusal to provide a single cell was motivated by discrimination against him because of his impairment. See 42 U.S.C. § 12132 ("... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); 29 U.S.C. §794(a) ("No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...."); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988) (The Equal Protection Clause is

violated by "arbitrary and irrational discrimination."). Along with their motion, Defendants submitted the following evidence:

> (1) Plaintiff was provided with a prisoner assistant to help him with daily activities. See Affidavit of Mary Jo Pass at ¶ 3; Affidavit of Chad Markwell at ¶ 4.
> (2) Plaintiff was allowed additional time for washing up than is ordinarily accorded to prisoners. Pass Affidavit at ¶ 3.
> (3) Plaintiff was assigned a lower bunk. Markwell Affidavit at ¶ 4.
> (4) Plaintiff was removed from the handicap cell when it was determined that he did not have appropriate authorization for placement in such a cell, and to make room for an incoming wheelchair-bound prisoner. See id. at ¶ 3; Klee Affidavit at ¶ 3; Affidavit of Bonnie Peterson at ¶ 3.[9]

These affidavits indicate that an effort was made to accommodate Plaintiff's impairment – an effort which Plaintiff does not dispute. This tends to undermine the proposition that Defendants were biased against Plaintiff on account of his impairment. Nor does Plaintiff supply compelling evidence of such a bias. Defendants are therefore entitled to summary judgment with respect to this issue.

Eighth Amendment

The Supreme Court has specifically rejected the argument that double-celling is a cruel and unusual punishment. See Rhodes v. Chapman, 452 U.S. 337, 347-50 (1981). Plaintiff indicates that this arrangement renders him particularly vulnerable to injury. See Plaintiff's Brief

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[9]Plaintiff acknowledges that a wheelchair-bound inmate was moved into the single cell formerly occupied by Plaintiff. See Affidavit of Timothy Williams-El at ¶ 7. The Court rejects as frivolous Plaintiff's suggestion that an alleged delay of "4 to 5 weeks" before this move was made contradicts the assertion that he was relocated in order to make room for the incoming handicapped prisoner. Id.

at 10, 13, 16. But there is nothing more than scant anecdotal evidence – in the form of Plaintiff's sworn complaint – to support the conclusion that Plaintiff would be significantly safer in a single cell. See Complaint at ¶ 49 (alleging that in October of 2002, he was "injured" and "developed new tumors" when his "cell-mate accidentally slammed into" his "entire arm and hand"). And even this meager evidence is undermined by the fact that, shortly before his allegedly harmful collision with a cell-mate, Plaintiff explained that he needed a single cell to provide "additional space" to "rest" his arm. Health Care Request (dated September 11, 2002; unmarked exhibit of Plaintiff's Brief). Compare Plaintiff's Brief at 17 (indicating that he needs a single cell "for mobility and to cure and ease any future hardship").

A jury could not reasonably infer from this record that double-celling is so risky to Plaintiff's well-being that it constitutes a violation of the Eighth Amendment. Summary judgment should therefore enter as to this issue.

Qualified Immunity

For reasons explained, the Court agrees with Defendant that Plaintiff has not established a constitutional or statutory violation in connection with the accommodation claim. As with the medical claim, then, Defendants are therefore also correct in asserting that Plaintiff is barred by the doctrine of qualified immunity from recovering monetary damages for the alleged failure to accommodate. See supra p. 15.

Conclusion

Defendants' motion for dismissal/summary judgment (D/E 27) should be granted. Pursuant to 42 U.S.C. § 1997e(a) and F.R.Civ.P. 56(c), the complaint should be dismissed

without prejudice. Alternatively, summary judgment in favor of Defendants should enter on the merits. The latter disposition would not fully resolve this case, as Plaintiff's claims against Dr. Pramstaller would remain to be adjudicated.[10]

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. Thomas v. Arn, 474 U.S. 140 (1985); Howard v. Secretary of HHS, 932 F.2d 505, 508 (6th Cir. 1991); United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991); Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

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[10]Plaintiff is proceeding *in forma pauperis*, and the United States Marshal was ordered to effect service. See D/E 4; F.R.Civ.P. 4(c)(2). The request for waiver of service on Dr. Pramstaller was returned unsigned with a cover letter from Susan Coley, Administrative Assistant for the MDOC's Bureau of Health Care Services. See D/E 11. In this letter, which is dated January 15, 2003, Coley explained that Dr. Pramstaller was "currently out of the office," and would be returning on January 27, 2003. Id. However, the Marshal apparently made no further effort to serve Dr. Pramstaller. Thus if the recommendation to dismiss the complaint is not accepted, the Court will enter an order directing the Marshal to again attempt service on Dr. Pramstaller. See F.R.Civ.P. 4(m); Byrd v. Stone, 94 F.3d 217, 219-20 (6th Cir. 1996).

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless, by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

VIRGINIA M. MORGAN
UNITED STATES MAGISTRATE JUDGE

Dated: JUL 22 2003